FILED
99 699 OCT 25 1999
OFFICE OF THE CLERK

No. ——

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

MICHAEL W. McCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

SANFORD D. BROWN
CERRATO, DAWES, COLLINS, SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75015

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

36pp

QUESTION PRESENTED

Whether a state law requiring a Boy Scout Troop to appoint an avowed homosexual and gay rights activist as an Assistant Scoutmaster responsible for communicating Boy Scouting's moral values to youth members abridges First Amendment rights of freedom of speech and freedom of association.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. Petitioners Boy Scouts of America and Monmouth Council, Boy Scouts of America.

2. Respondent James Dale.

Boy Scouts of America and Monmouth Council, Boy Scouts of America are not-for-profit corporations without stockholders. The only affiliate of Boy Scouts of America is Learning for Life, a not-for-profit corporation. Boy Scouts of America charters approximately 318 not-for-profit corporations as local Councils such as Monmouth Council to support Boy Scouting and other Scouting programs in particular geographic areas, and charters numerous religious and other organizations in localities throughout the country to operate Boy Scout Troops and other Scout units.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
Boy Scouts of America	2
Respondent James Dale	5
The Superior Court of New Jersey, Chancery Division	7
The Superior Court of New Jersey, Appellate Division	8
The Supreme Court of New Jersey	8
The Statutory Question	8
The First Amendment	10
REASONS FOR GRANTING THE PETITION	12
A. THE DECISION BELOW ENDANGERS IMPORTANT CONSTITUTIONAL PRINCIPLES OF FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION	12
B. THE DECISION BELOW CONFLICTS WITH THIS COURT'S UNANIMOUS RULING IN *HURLEY*	20

TABLE OF CONTENTS—Continued

Page

C. THE DECISION BELOW IMPLICITLY CONFLICTS WITH THE DECISIONS OF FOUR STATE SUPREME COURTS AND ONE FEDERAL COURT OF APPEALS 26

CONCLUSION 29

APPENDIX ..... Separately Bound

TABLE OF AUTHORITIES

CASES

Page

Board of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 12

Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410 (CA6 1996) 15

Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (CA8 1987) 16

Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670, 952 P.2d 218 (1998) 5, 14, 26

Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981) 17

Downey-Schottmiller v. Chester County Council of the Boy Scouts of America, No. P-3986 (Pa. Human Relations Comm'n July 27, 1999), appeal docketed, No. 2291 CD 1999 (Pa. Commw. Ct. Aug. 27, 1999) 5, 28

EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) 15

Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) 15

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) 25

Gosche v. Calvert High Sch., 997 F. Supp. 867 (N.D. Ohio 1998) 16

Harvey v. YWCA, 533 F. Supp. 949 (W.D.N.C. 1982) 16

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) ..... *passim*

Hutchison v. Thomas, 789 F.2d 392 (CA6 1986) 15

Little v. Wuerl, 929 F.2d 944 (CA3 1991) 15

Maguire v. Marquette Univ., 814 F.2d 1213 (CA7 1987) 16

Mankes v. Boy Scouts of America, Inc., 137 F.R.D. 409 (S.D. Fla. 1991) 5

McClure v. Salvation Army, 460 F.2d 553 (CA5 1972) 15

McConnell v. Anderson, 451 F.2d 193 (CA8 1971) 16

Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990) 15

TABLE OF AUTHORITIES—Continued

	Page
Minnesota ex rel. Beaulieu v. Boy Scouts of America, D.C. File No. MX 92-07717 (Minn. Dist. Ct. Aug. 6, 1992)	5
Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984)	17
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)	12
Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (CA1 1989)	15
New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988)	12
Pool v. Boy Scouts of America, Nos. 93-030-PA, 93-031-PA (D.C. Dep't of Human Rights & Minority Bus. Dev.) (post-hearing briefing concluded May 18, 1998)	5, 28
Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities, 204 Conn. 287, 528 A.2d 352 (1987)	5, 26
Randall v. Orange County Council, Boy Scouts of America, 17 Cal. 4th 736, 952 P.2d 261 (1998)	5, 26-27
Rayburn v. General Conference of Seventh-day Adventists, 772 F.2d 1164 (CA4 1985)	15
Richardson v. Chicago Area Council of Boy Scouts of America, No. CCHR 92-E-80 (Chicago Comm'n on Human Relations 1996), *aff'd in rel. part*, No. 96 CH 3266 (Ill. Cir. Ct. Aug. 12, 1999), *appeal docketed*, No. 99-3018 (Ill. App. Ct. Aug. 23, 1999)	28
Roberts v. United States Jaycees, 468 U.S. 609 (1984)	*passim*
Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360 (CA8 1991)	15
Schwenk v. Boy Scouts of America, 275 Or. 327, 551 P.2d 465 (1976)	5, 26
Seabourn v. Coronado Area Council, Boy Scouts of America, 257 Kan. 178, 891 P.2d 385 (1995)	5, 26
Welsh v. Boy Scouts of America, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993)	5, 26

TABLE OF AUTHORITIES—Continued

	Page
Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184 (CA7 1994)	15
CONSTITUTION AND STATUTES	
U.S. Const. amend. I	1
U.S. Const. amend. XIV, § 1	1
28 U.S.C. § 1257(a)	1
N.J. Stat. Ann. § 10:5-4 (West 1993)	2
N.J. Stat. Ann. § 10:5-5(l) (West 1993)	2, 9
N.J. Stat. Ann. § 10:5-5(hh) (West 1993)	2, 6
PUBLICATIONS	
National Comm'n on Civil Renewal, *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do About It* (1999)	13
Alexis de Tocqueville, *Democracy in America* (J.P. Mayer ed. & George Lawrence trans., Harper-Perennial 1969) (1835)	13
Nancy L. Rosenblum, *Membership & Morals: The Personal Uses of Pluralism in America* (1998)	13
Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society (Mary Ann Glendon & David Blankenhorn eds., 1995)	13

PETITION FOR A WRIT OF CERTIORARI

Petitioners Boy Scouts of America and Monmouth Council, Boy Scouts of America respectfully petition for a *writ of certiorari* to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The decision of the Supreme Court of New Jersey (1a-101a)[1] is reported at 160 N.J. 562, 734 A.2d 1196 (1999). The decision of the Superior Court of New Jersey, Appellate Division (102a-154a) is reported at 308 N.J. Super. 516, 706 A.2d 270 (1998). The decision of the Superior Court of New Jersey, Chancery Division (155a-224a) is unreported.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on August 4, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves provisions of the First and Fourteenth Amendments to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ; or the right of the people peaceably to assemble . . . ." U.S. Const. amend. I.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

---

[1] Numbers followed by "a" refer to pages in the bound Appendix submitted with this Petition. Numbers preceded by "A." refer to pages in the record before the New Jersey Supreme Court.

The pertinent New Jersey statutes, New Jersey Statutes Annotated, title 10, chapter 5, sections 10:5-4, 10:5-5(l), and 10:5-5(hh), N.J. Stat. Ann. §§ 10:5-4, 10:5-5(l) & 10:5-5(hh) (West 1993), are reprinted at 225a-226a.

STATEMENT OF THE CASE

Boy Scouts of America

Boy Scouts of America is a non-profit organization whose mission is to instill the values of the Scout Oath and Law in young people and "to prepare them to make ethical choices over their lifetime in achieving their full potential." (A.2238.) Boy Scouts, boys between the ages of 11 and 17, and their adult leaders must commit themselves to the values of the Scout Oath and Law:

Scout Oath

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

Scout Law

A Scout is . . .

Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent

(A.2542-A.2548.)

Boy Scouting activities are conducted primarily in small units, called "Troops," which typically consist of

15 to 30 boys led by several adult volunteers. (A.2224.) Nationally and in New Jersey, over 60 percent of Boy Scout Troops are sponsored by churches or synagogues. (A.2133.) For many churches and synagogues, Boy Scouting is an integral part of their youth programs. (*E.g.*, A.2128-A.2134; A.4684-A.4685 (Catholic); A.4659-A.4661 (Conservative Jewish); A.4664-A.4665 (Lutheran-Missouri Synod); A.4681-A.4682 (Latter-day Saints); A.4687-A.4688 (Baptist).)

Adult volunteer leaders are expected to be role models for the values of the Scout Oath and Law. (A.2234; A.2651.) *The Scoutmaster Handbook* gives leaders the responsibility to set the example for youth in their charge: "Boys learn from the example set by their adult leaders." (A.2652.) Adult leaders guide Boys Scouts on the subject of "moral fitness." (A.2650.) *The Scoutmaster Handbook* also cautions leaders to avoid inconsistencies between their statements and actions: "practice what you preach . . . . The most destructive influence on boys is adult inconsistency and hypocrisy." (A.2695.)

Adult leaders must be approved by the local sponsoring organization (often the church or synagogue) as well as the local Council and Boy Scouts of America. (A.2957-A.2958.) They must satisfy certain requirements. "In addition to the Scout Oath and Law requirements, adult members are bound by the Declaration of Religious Principle, and subject to evaluation according to informal criteria designed to select only individuals capable of accepting responsibility for the moral education and care of other people's children in accordance with scouting values." (38a; A.2976-A.2979.) Agnostics and atheists are ineligible to serve as adult leaders because they do not agree with the "duty to God" and "reverent" requirements of the Oath and Law. Known or avowed homosexuals are ineligible to serve because of Boy Scouts of America's be-

liefs regarding sexual morality, reflected in part in the "morally straight" and "clean" requirements of the Oath and Law.[2] (A.3238-A.3247.) Would-be leaders can be excluded for any number of additional reasons on a case-by-case basis. Boy Scouting takes very seriously its responsibility to place in positions of leadership only those adults who will be appropriate role models for Boy Scouts. No one has a "right" to be a Boy Scout leader.

Boy Scouting "espouses family values" which emphasize marriage and fatherhood. (A.4395.) *The Boy Scout Handbook* describes how a young man attains "[t]rue manliness" by accepting his "responsibility to women," his "responsibility to children" when he marries and has a family, his responsibility to his religious beliefs, and his responsibility to himself. (A.2531-A.2532.) Responsibility for inculcating these values, and other aspects of Boy Scouting, is entrusted to the Scoutmaster. If a boy is in doubt about how to conduct himself, *The Boy Scout Handbook* tells him to look to his Scoutmaster for guidance: "If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your . . . Scoutmaster." (A.2532.) In turn, *The Scoutmaster Handbook* advises adult leaders to be responsive: "Be accepting of their concerns about sex. Be very open and clear when talking with them." (A.2692.)

For most of its history, Boy Scouting did not need to issue specific directives on the subject of homosexual conduct because there was a broad societal consensus on the subject. Homosexual sodomy was a crime in every state.

---

[2] Boy Scouting makes no effort to investigate the sexual orientation of members or leaders. (A.3247.) Its expressive purpose is not implicated unless an applicant presents himself as a role model inconsistent with Boy Scouting's understanding of the Scout Oath and Law.

New Jersey itself did not decriminalize homosexual conduct until 1979, and did not add "sexual orientation" to its list of nondiscrimination categories until 1992. Since the early 1980s, however, Boy Scouts of America has faced litigation under public accommodations laws in federal courts, state courts, and state administrative agencies in numerous jurisdictions.[3] As a result, the organization has periodically issued position statements to assist Boy Scouting officials in communicating about membership issues. (A.3241-A.3247.) Throughout this period, Boy Scouts of America has consistently taken the position that homosexual conduct is inconsistent with the principles of the Scout Oath and Law.

Respondent James Dale

As a boy, respondent James Dale was active in Boy Scouting, spending his last three years in Troop 73, which was sponsored by First United Methodist Church in Matawan, New Jersey. (A.3288-A.3289.) He attained the rank of Eagle and was elected to the Order of the Arrow, an honorary organization within Boy Scouting. At

---

[3] *See Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993); *Mankes v. Boy Scouts of America, Inc.*, 137 F.R.D. 409 (S.D. Fla. 1991); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998); *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998); *Quinnipiac Council, Boy Scouts of America, Inc. v. Commision on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 325 (1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (1995); *Minnesota ex rel. Beaulieu v. Boy Scouts of America*, D.C. File No. MX 92-07717 (Minn. Dist. Ct. Aug. 6, 1992); *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976); *Downey-Schottmiller v. Chester County Council of the Boy Scouts of America*, No. P-3986 (Pa. Human Relations Comm'n July 27, 1999), *appeal docketed*, No. 2291 CD 1999 (Pa. Commw. Ct. Aug. 27, 1999); *Pool v. Boy Scouts of America*, Nos. 98-030-PA, 98-031-PA (D.C. Dep't of Human Rights & Minority Bus. Dev.) (post-hearing briefing concluded May 18, 1998).

the age of 18, Dale automatically ceased to be a Boy Scout. (A.3336-A.3337.) Dale thereafter registered as an Assistant Scoutmaster for Troop 73, but since he had gone away to college, Dale had very little further involvement with Boy Scouting or the Troop. (A.3251-A.3252; A.3346-A.3350.)

On July 8, 1990, *The Star-Ledger* published a picture of Dale and an article reporting an interview of Dale as a gay activist. (A.1946.) Dale had become Co-President of the Rutgers University Lesbian/Gay Alliance in his sophomore year at college. Having "pretend[ed] to be straight" in high school, Dale testified at deposition that he came to believe while in college that homosexuality "is not immoral," and he "became deeply involved in gay rights issues and maintained a high profile on campus." (A.3371-A.3374; A.3384.) After Monmouth Council headquarters received copies of the article from leaders throughout the Council who were aware of Dale's Boy Scouting position, Dale's registration as an adult leader was revoked. (A.281; A.3576.) Monmouth Council's Scout Executive James W. Kay explained that the grounds for his membership revocation were "the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals." (A.1950.) Upon request for review, higher Boy Scouting authorities informed Dale that he was ineligible to lead Boy Scouts because "Boy Scouts of America does not admit avowed homosexuals to membership in the organization." (A.1957.)

About 18 months later, on January 18, 1992, the public accommodation and other provisions of the New Jersey Law Against Discrimination (the "LAD"), were amended to extend to "affectional or sexual orientation." N.J. Stat. Ann. § 10:5-5(hh) (West 1993). On July 29, 1992, Dale sued petitioners, seeking reinstatement and compensatory and punitive damages, and alleging that volunteer service as an Assistant Scoutmaster was one of the "advantages" of "a place of public accommodation." Upon filing the Complaint, Dale gave an interview, published in *The New York Times,* in which he said:

> I owe it to the organization to point out to them how bad and wrong this policy is . . . . Being proud about who I am is something the Boy Scouts taught me. They taught me to stand up for what I believe in.

(A.3366-A.3367; A.3548.)

The Superior Court of New Jersey, Chancery Division

On the parties' cross-motions for summary judgment, the Superior Court of New Jersey, Chancery Division granted summary judgment for petitioners and dismissed Dale's Complaint. (224a.) The Chancery Division ruled that Boy Scouting was not a place of public accommodation and was exempt from the LAD as a distinctly private institution. The Chancery Division also held that petitioners "have First Amendment freedom of expressive association rights preventing government from forcing them to accept Dale as an adult leader-member." (224a.) The court found:

> Since its inception Scouting has sincerely and unswervingly held to the view that an "avowed", sexually-active homosexual is engaging in immoral behavior which violates the Scout Oath (in which the person promises to be "morally straight") and the Scout Law (whereby the person promises to keep himself "clean"). The exclusion or termination of an adult leader who openly advocates consensual homosexuality is no less rational than excluding one who advocates any other type of behavior (such as promiscuous heterosexual activity) which [Boy Scouts of America] holds to be morally wrong.

(223a.)

The Superior Court of New Jersey, Appellate Division

The Appellate Division reversed by a 2-1 vote, holding that Boy Scouting was covered by the LAD and that Boy Scouts of America and Monmouth Council had no First Amendment right to exclude Dale because of his "statements as a 'gay activist,' " "his 'message,' " or "his avowed homosexuality." (139a.) The majority concluded that Boy Scouting could claim no constitutional "privilege" to exclude Dale "when the sole basis for the exclusion is the gay's exercise of his own First Amendment right to speak honestly about himself." (149a.) Judge Landau dissented on the First Amendment issue: "We may not compel the Boy Scouts to alter a message which they wish to convey by including messages more acceptable to others." (153a) (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 581 (1995)).

The Supreme Court of New Jersey

The Supreme Court of New Jersey affirmed, holding the statute applicable and denying the First Amendment defense.

The Statutory Question. The court ruled that Boy Scouting was a public accommodation on the basis of "various factors" (24a), including Boy Scouting's high visibility in the community, public solicitation of members, and "the symbolism of the Boy Scout uniform" worn in public places. (25a-27a.) Boy Scouting also was a public accommodation because it received certain government benefits, including a federal charter, the support of Presidents and members of Congress, access to some military and other public facilities, and sponsorship of some Troops by governmental entities. (27a-30a.)[4]

[4] Sponsorship by public institutions is dwindling, partly as a result of litigation or political concern regarding Boy Scouting's membership requirements. This case does not involve the question whether public bodies can or should sponsor Boy Scout Troops.

The New Jersey legislature had enacted several exceptions to the public accommodation law to protect the rights of constitutionally protected associations. N.J. Stat. Ann. § 10:5-5(l) (exempting "distinctly private" institutions, clubs or places of accommodation; educational facilities operated or maintained by religious or sectarian institutions; and parents or individuals acting *in loco parentis* to direct the "education and upbringing" of children). The court refused to apply these exceptions to Boy Scouting.

First, Boy Scouting was not "distinctly private" because it encourages local Councils and Boy Scout Troops "to see that *all* eligible youth have the opportunity" to join. (35a-36a.) Even though Boy Scouting "requires members to comply with the Scout Oath and Law," the court ruled that the Scout Oath and Law do not operate as "genuine selectivity criteria" because "the record discloses few instances in which the Oath and Law have been used to exclude a prospective member." (37a.) While adult leadership standards were more restrictive than youth membership, Boy Scouting could not be held to be private only with respect to adult leaders, "a small subset of the larger group." (38a.)

Second, Boy Scouting could not qualify as an " 'educational facility operated or maintained by a bona fide religious or sectarian institution' " because Boy Scouting "is nonsectarian." (39a) (quoting N.J. Stat. Ann. § 10:5-5(1)). Repeated expression of belief in God through membership recitation of the Scout Oath did not qualify Boy Scouting as a religious institution; Boy Scouting's commitment to education did not qualify it as an educational facility. (39a-40a.)

Finally, despite the Scoutmaster's supervisory role during campouts and other activities, the court concluded that Boy Scouting does not act *in loco parentis* because leaders do not " 'maintain, rear and educate' " children in the place of the parent. (40a-41a.)

The First Amendment. The New Jersey Supreme Court held that Boy Scouting is not " 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." (48a.) In the court's opinion, Boy Scouting, composed of Troops of 15 to 30 boys and several adult leaders, was too "large" to warrant protection. (48a.) Other factors included Boy Scouting's "nonselectivity," its attempt at inclusiveness rather than exclusiveness, and its practice of inviting "nonmembers" to attend recruiting meetings and allowing "nonmembers" to attend the boys' Courts of Honor (i.e., award ceremonies). (49a-50a.) The court concluded that adult leaders did not substitute for the boys' parents and did not have private relationships with Troop members. (49a.)

The court rejected the expressive association defense:

> The organization's ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scouts members do not associate *for the purpose of* disseminating the belief that homosexuality is immoral; *Boy Scouts discourages its leaders from disseminating any views on sexual issues*; and Boy Scouts include sponsors and members who subscribe to different views in respect of homosexuality.

(52a) (emphasis added). Furthermore, the LAD served "a compelling state interest and 'abridges no more speech or associational freedom than is necessary to accomplish that purpose.' " (63a) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984)).

The court did acknowledge that Boy Scouting engages in expressive activity "designed to build character and in-

still moral principles." (64a.) "We agree that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." (53a.) However, the court found that it was not a " 'shared goal[]' " or "shared view[]" of members to "associate in order to preserve the view that homosexuality is immoral." (52a-54a.) The court opined that the "words 'morally straight' and 'clean' do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral." (55a.) The court disregarded a 1978 Boy Scout position statement as "[un]disseminated" and four later position statements as "self-serving." (54a.) The court decided that Boy Scouting's stated position on homosexuality is based on "prejudice" and "bigotry." (59a; 61a.)

In addressing petitioners' freedom of speech defense, the court distinguished *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), on the grounds that Dale does not come to Boy Scout meetings " 'carrying a banner' " and that his "status as a scout leader is not equivalent to a group marching in a parade." (65a.) The court concluded that "unlike a parade, where the 'speech itself . . . [is] the public accommodation,' " ordering Dale into a position of adult Scout leader "in no way prevents Boy Scouts from 'invok[ing] its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.' " (66a) (quoting *Hurley*, 515 U.S. at 573-74).

In a concurring opinion, Justice Handler concluded that it is "untenable . . . in the absence of a clear, particular, and consistent message to the contrary, that Boy Scouts . . . remains entrenched in the social mores that existed at the time of its inception." (100a.) Boy Scout-

ing must reject "stereotypes" and accept that a homosexual "is no more or less" moral than a heterosexual. (95a-96a.)

REASONS FOR GRANTING THE PETITION

A. THE DECISION BELOW ENDANGERS IMPORTANT CONSTITUTIONAL PRINCIPLES OF FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION

This case involves constitutional rights at the heart of our free society: the freedom of a private, voluntary, noncommercial organization to create and interpret its own moral code, and to choose leaders and define membership criteria accordingly. This Court has called it "beyond debate" that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (citations omitted). "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

In a trilogy of cases involving freedom of association, *Roberts*, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988), the Court has distinguished between relatively unprotected groups—epitomized by businesses or gatherings for commercial purposes—and "intimate" or "expressive" associations whose character entitles them to the highest level of constitutional protection in defining their missions and in selecting their members and leaders accordingly. "Infringements on that right may be justified

by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. Most recently, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), this Court unanimously concluded that it is unconstitutional for a state to apply a law forbidding discrimination on the basis of sexual orientation to an expressive private group, where application of the law would interfere with the ability of the group to control its own message.

These principles of freedom of speech and freedom of association are essential to preserving what many call "civil society"—the network of private institutions, societies, and congregations between the individual and the state that enable free people to work together for common ends.[5] These ends may include moral beliefs that are controversial in society at large. As Justice Brennan explained for the Court in *Roberts*: "According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." 468 U.S. at 622.

These First Amendment principles are manifestly endangered by the decision below. This Court's guidance is necessary to ensure that freedom of speech and association

---

[5] *See* National Comm'n on Civil Renewal, *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do About It* (1999); Nancy L. Rosenblum, *Membership & Morals: The Personal Uses of Pluralism in America* (1998); *Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society* (Mary Ann Glendon & David Blankenhorn eds., 1995). A vibrant diversity of private associations has long been the hallmark of American culture. *See* Alexis de Tocqueville, *Democracy in America* 513-14 (J.P. Mayer ed. & George Lawrence trans., HarperPrennial 1969) (1835).

is not undermined by unsympathetic state court interpretation.

Boy Scouts of America is a "charitable, expressive, and social organization" whose "primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization's primary purpose." *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 697, 952 P.2d 218, 236 (1998). As described by the California Supreme Court, "Scouts meet regularly in small groups (often in private homes) that are intended to foster close friendship, trust and loyalty, and scouts are required to participate in a variety of activities, ceremonies, and rituals that are designed to teach the moral principles to which the organization subscribes." *Id.* at 698, 952 P.2d at 236. Indeed, in *Roberts*, Justice O'Connor cited the Boy Scouts and Girl Scouts as examples of expressive associations: "Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." 468 U.S. at 636 & n.* (O'Connor, J., concurring) (quoting Paul Fussell's observation that *The Official Boy Scout Handbook* is "another book about goodness").

The New Jersey Supreme Court's decision that a Boy Scout Troop must appoint respondent Dale as a uniformed Assistant Scoutmaster raises important issues affecting Boy Scouting's freedoms of speech and association. The organization interprets its moral code as inconsistent with homosexual conduct. Dale, by his own description, is a sexually active homosexual and was prominent in gay rights causes at Rutgers University. (14a; 110a; A.3384.) He has stated publicly that he disagrees with Boy Scouting's moral position against homosexual conduct and that

he "owe[s] it to the organization to point out to them how bad and wrong this policy is." (A.3548.)

The court's decision to require an organization to put into a leadership position a person who, by word and deed, disagrees with the organization's moral code conflicts with the Constitution in at least three ways.

First, the application of state law here violates Boy Scouting's freedom of speech. The choice of a leader is an inherently expressive decision. Its expressive quality goes far beyond the communication of specific explicit messages. If a Troop were required to accept a known Ku Klux Klansman as its Scoutmaster, this would interfere with the organization's message of racial harmony even if he never uttered a word on the subject of race. In analogous contexts, churches and synagogues have an absolute right to choose their own ministers and rabbis;[6] political parties have the right to select their own leaders. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 229-30 (1989). Expressive associations enjoy a comparable protection to select their leaders without governmental interference.[7]

---

[6] *See, e.g., EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996); *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 187-88 (CA7 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (CA8 1991); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1358-60 (D.C. Cir. 1990); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577-78 (CA1 1989); *Hutchison v. Thomas*, 789 F.2d 392, 393 (CA6 1986); *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168-69 (CA4 1985); *McClure v. Salvation Army*, 460 F.2d 553, 560 (CA5 1972).

[7] In the employment context, where constitutional protection is less rigorous, courts permit private organizations to reject inappropriate role models. *See Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 414-15 (CA6 1996) (unmarried pregnant teacher dismissed for not setting Christian example); *Little v. Wuerl*, 929 F.2d 944, 951 (CA3 1991) (Catholic school permitted not to rehire re-

An organization cannot speak except through its agents, which in this context means the adults who serve as volunteer leaders. The positions of Scoutmaster and Assistant Scoutmaster are particularly closely tied to the communication of Boy Scouting's moral message. These leaders are the embodiment of the ideals of Boy Scouting to the boys in the Troop.

Respondent Dale acknowledges that the Scoutmaster serves as "a role model for the younger Scouts and as a counselor to the older Scouts." (A.3383; A.3553.) Troop meetings end with a "Scoutmaster's Minute" in which the leader gives inspirational remarks, usually focusing on a point of the Scout Oath or Law. (A.2228; A.2730-A.2731; A.2812.) The Scoutmaster's role includes communication of the organization's teachings on sexual morality. *The Scoutmaster Handbook* advises that "[m]oral fitness, like emotional fitness, will clearly present oppor-

---

married teacher because school could hire only those whose beliefs and conduct were consistent with its purposes); *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 703-705 (CA8 1987) (living by certain code of behavior constitutes bona fide occupational qualification for Girls Club counselors expected to act as role models); *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 (CA7 1987) (plaintiff's controversial beliefs regarding abortion would have prevented Catholic school from hiring plaintiff); *McConnell v. Anderson*, 451 F.2d 193, 196 (CA8 1971) (court rejected plaintiff's argument that he had been refused library employment on basis of his sexual orientation because he sought right "to pursue an activist role in *implementing* his unconventional ideas concerning societal status to be accorded homosexuals and, thereby, to foist tacit approval of this socially repugnant concept upon his employer"); *Gosche v. Calvert High Sch.*, 997 F. Supp. 867, 871 (N.D. Ohio 1998) (Catholic school teacher properly dismissed because her sexual conduct was not fulfilling the legitimate expectation that she would "by word and example . . . reflect the values of the Catholic Church"); *Harvey v. YWCA*, 533 F. Supp. 949, 954-55 (W.D.N.C 1982) (unmarried pregnant woman who wished to role model an alternative lifestyle to teenagers properly discharged because Christian sexual morality was bona fide occupational qualification for position of YWCA girls counselor).

tunities for wise guidance by an alert Scoutmaster." (A.2650.) In a section on "Sexual Curiosity," *The Scoutmaster Handbook* instructs: "If Scouts come to you to ask questions or seek advice, you would give it within your competence." (A.3588-A.3589.) It advises: "Be accepting of their concerns about sex. Be very open and clear when talking with them." (A.2692.)

The New Jersey Supreme Court's assertion that the statute "does not have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views" (52a), is contrary to the plain fact of the matter. What better way to frustrate Boy Scouting's ability to promote its understanding of sexual morality than to install respondent Dale, or other opponents of Boy Scouting's message, as Troop leaders? As the Court stated in *Hurley*, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." 515 U.S. at 576.

Second, the New Jersey court's decision violates rights of expressive association. The criteria for membership or leadership in an expressive association are themselves expressive, and constitutive of the identity of the organization. The constitutional right to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). *See also Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984) ("the First Amendment guarantees the . . . freedom to associate or not to associate with whom they please"). As Justice O'Connor has explained: "Protection of the association's right to define its membership derives from the recognition that

the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring).

Boy Scouting is an expressive organization with the purpose of instilling in boys and young men certain ideals of what it means to be a man. Youth membership is therefore confined to males, to believers in God, and to those who subscribe to the Scout Oath and Law. All of these criteria—sex, religion, and morality (including sexual conduct)—appear, on their face, to violate New Jersey's LAD. But if the state is permitted to impose its will on Boy Scouting in these respects, Boy Scouting would cease to be recognizable. Application of the LAD would "necessarily affect, change, dilute, or silence" the "collective voice" of Boy Scouting in violation of the First Amendment. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring).

Third, this case raises important questions regarding freedom of intimate association. This Court has explained that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State." *Roberts*, 468 U.S. at 618-19.

Boy Scout Troops precisely meet this description. They are small groups of boys and adult leaders; their functions are utterly noncommercial and unrelated to business or business opportunities; their activities are not open to the general public; they are an integral part of the youth program of many churches and synagogues; they involve personal communication on moral and intimate subjects; and they involve physical activity on group hikes and

campouts far from the public gaze.[8] Moreover, unlike the relationships characteristic of Rotarian meetings, the relationships within the Troop are the source of "emotional enrichment" and identity formation for the participants. *Roberts*, 468 U.S. at 619. Respondent Dale testified that his Scouting experience as a boy "had an extremely large effect on my socialization." (A.3353.) Boy Scout Troops are more nearly an extension of home, church, and friendship than of the commercial or public sphere. Yet the court below treated a Boy Scout Troop as constitutionally indistinguishable from a Rotary chapter. (48a-50a.) Under that analysis, it is difficult to imagine an association, other than perhaps a family, that would receive constitutional protection.

In short, application of New Jersey's law would affect substantially the speech, expressive character, and personal relationships in Boy Scout Troops. It raises issues of profound constitutional significance not only to the members and leaders involved in Boy Scouting across the country, but to the tens of millions of citizens—young and old—involved in other voluntary associations of a noncommercial character. If a Boy Scout Troop in Monmouth County, New Jersey could be required to accept a leader whose avowed conduct and opinions contradict the stated mission and message of the organization, it is difficult to see what is left of freedom of association.

---

[8] The evidence showed that prospective members and their parents were invited to attend a limited number of meetings (including "School Nights") for the very purpose of interesting them in joining. (A.2710-A.2712.) Unlike Rotary Club meetings, nonmembers (other than parents) do not regularly attend Troop meetings, or activities such as hikes, campouts, summer camps, or service projects.

B. THE DECISION BELOW CONFLICTS WITH THIS COURT'S UNANIMOUS RULING IN *HURLEY*

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), this Court held that application of a state public accommodation law to force private organizers of a St. Patrick's Day parade to include the Gay, Lesbian, and Bisexual Group of Boston ("GLIB") was unconstitutional. In a decision almost identical in its reasoning to that of the court below, the Massachusetts Supreme Judicial Court had held that the parade was a "public accommodation" under state law, that exclusion of GLIB from the parade constituted discrimination on the basis of sexual orientation, and that requiring the parade organizers to allow GLIB to march would not violate the organizers' First Amendment rights. *See id.* at 563-64. The Massachusetts court rejected the organizers' First Amendment claim on the rationale that the parade lacked any " 'specific expressive purpose' " that would be threatened by the presence of the marchers. *Id.* at 564 (quoting 418 Mass. 238, 249, 636 N.E.2d 1293, 1299 (1994)).

This Court unanimously reversed. As an initial matter, the Court noted that it had a "constitutional duty to conduct an independent examination of the record as a whole," and was not bound by "the state courts' conclusion that the factual characteristics of petitioners' activity place it within the vast realm of nonexpressive conduct." *Id.* at 567. The same standard of review applies in this case. Turning to the question whether the St. Patrick's Day parade was entitled to First Amendment protection, the Court held that a parade is an inherently expressive activity. The Court specifically rejected the argument that "a narrow, succinctly articulable message is . . . a condition of constitutional protection." *Id.* at 569. Nor, according to the Court, did the relative nonselectivity of the

parade organizers in choosing participants deprive the group of the right to exercise selectivity when it chose to do so. "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70.

This Court found that GLIB's participation in the parade was "equally expressive." *Id.* at 570. Notwithstanding the fact that GLIB sought only to display its own name, and not to make any other political or moral statement, the Court recognized that even the mere self-identification of the group would serve the purpose of "celebrat[ing] its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants." *Id.* According to the Court, "GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own." *Id.*

The Court held that requiring the parade organizers to include GLIB in their parade "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. This includes the right to decide " 'what not to say.' " *Id.* (citation omitted). The organizing committee "clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id.* at 574. The Court noted that the "message it disfavored" was GLIB's message "bear[ing] witness to the fact that some Irish are gay, lesbian, or bisexual," and its "view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals." *Id.*

Finally, the Court analyzed the issue under the doctrine of expressive association, as reflected in the *Roberts* tril-

ogy. On the assumption that the St. Patrick's Day parade was "large enough" and "a source of benefits," so as to make it analogous to the clubs in those cases, the Court held that "GLIB could nonetheless be refused admission." *Id.* at 580-81. A "private club," the Court explained, has the right to "exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 581.

This case is constitutionally indistinguishable from *Hurley*. Boy Scouting, like the parade, is an expressive association and has a right to control its own message. Under *Hurley*, it would not matter if Boy Scouting had ever promulgated a "narrow, succinctly articulable message" regarding homosexual conduct, 515 U.S. at 569, and it would not matter if its criteria for membership or leadership were selective, *id.* at 569-70. Indeed, the expressive quality of Boy Scouting's association is clearer than that of the parade in *Hurley*. It was not readily apparent what message the St. Patrick's Day parade was intended to communicate, whereas Boy Scouting has a distinct moral message embodied in the Scout Oath and Law. Even the court below conceded: "We agree that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." (53a.) Moreover, respondent Dale's intended participation in Boy Scouting is "equally expressive." As an open and avowed homosexual, he wishes to "celebrate his identity" as an openly gay Scout leader in precisely the same way that the GLIB marchers wished to celebrate their sexual identity, and to "bear witness" to his "view that people of [his] sexual orientation[] have as much claim to unqualified social acceptance as heterosexuals." *Hurley*, 515 U.S. at 574.

Just as including the GLIB group in the St. Patrick's Day parade would "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," *id.* at 573, appointing respondent Dale as Assistant Scoutmaster of a Troop would interfere with Boy Scouting's ability to control the content of *its* message. Dale would not be willing to communicate Boy Scouting's view of sexual morality, and it is not unlikely that he would communicate a view inconsistent with that of Boy Scouting; indeed, his very presence as a role model would interfere with communication of its message.

The attempt by the New Jersey Supreme Court to distinguish *Hurley* does not withstand scrutiny. The court asserted that *Hurley* is "distinguishable" on the ground that "Dale's status as a scout leader is not equivalent to a group marching in a parade. Dale does not come to Boy Scout meetings 'carrying a banner.' Dale has never used his leadership position or membership to promote homosexuality, or any message inconsistent with Boy Scouts' policies." (65a-66a.) But that simply denies the expressive qualities of the Scoutmaster's role. Scoutmasters are entrusted with the responsibility of conveying the organization's values to the youth members. If a single self-identifying banner in a multifarious parade is enough to trigger constitutional protection, surely appointment of a person "whose manifest views were at odds with a position taken by the club's existing members," *id.* at 581, to serve as role model, counselor, and uniformed leader is a far more serious intrusion.

The New Jersey court's other reasons for denying Boy Scouting its rights as an expressive association are even more patently inconsistent with this Court's teachings in *Hurley* and the *Roberts* trilogy. First, the court questioned the accuracy of Boy Scouting's own description of its beliefs. (53a-54a.) The court was "not persuaded" that a " 'shared goal[]' of Boy Scout members is to asso-

ciate in order to preserve the view that homosexuality is immoral." (53a.) That is simply a pejorative characterization of Boy Scouting's goals: Boy Scout members associate in order to promote a certain set of moral values, of which the view that homosexuality is immoral is merely a small part. No doubt, the same could be said of the parade organizers in *Hurley*, but that did not prevent this Court from holding, unanimously, that they had a constitutional right to control the content of their message.

Worse yet, the court took it upon itself to second-guess Boy Scouting's interpretation of the Scout Oath and Law. According to the court, the words "morally straight" and "clean" in the Scout Oath and Law do not "express anything about sexuality." (55a.) Indeed, the court asserted that Boy Scouting's stance on homosexuality "appears antithetical to the organization's goals and philosophy." (59a.) Nothing could be more inconsistent with First Amendment principles than for the state to deny an organization its free speech rights on the ground that the organization does not accurately understand its own philosophy. The "fundamental rule of protection under the First Amendment" is that a speaker (including a group) "has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. The New Jersey court may think that Boy Scouting should interpret its Oath and Law as expressing nothing about sexuality. But Boy Scouting thinks otherwise. "[T]he point of all speech protection," this Court has said, "is to shield just those choices . . . that in someone's eyes are misguided, or even hurtful." *Id.* at 574 (citations omitted).

Relatedly, the New Jersey court maintained that "no single view on this subject functions as a unifying associational goal of the organization," pointing to several religious umbrella groups (whose local churches may or may not sponsor Scouting units) that allegedly "differ in their

views about homosexuality."[9] (55a-56a.) But it is not uncommon for members of expressive groups to disagree about some aspects of the group's beliefs. Some Roman Catholics believe that women should be ordained as priests. That would be no justification for overriding the Church's freedom of association, and forcing the Church to ordain female priests. The First Amendment entitles organizations to resolve internal disagreements for themselves.

Finally, the New Jersey Supreme Court denied protection to Boy Scouting because it views Boy Scouting's moral position on homosexuality as "based on little more than prejudice." (59a.) The court delivered a sermon about "the human price of this bigotry," and insisted that "the principle of equality" take precedence over Boy Scouting's freedom of association. (61a.) Such a line of attack is squarely inconsistent with this Court's insistence that "[d]isapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others." *Hurley*, 515 U.S. at 581. *Accord Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974) ("The freedom to associate applies to the beliefs we share, and to those we consider reprehensible."). The New Jersey Supreme Court's zeal in attacking the "bigotry" of Boy Scouting underscores the need for this Court's review, lest First Amendment rights be sacrificed in the interest of a new orthodoxy.

---

[9] The court confused statements that homosexuals should have civil rights with the view that homosexual conduct is moral. (*E.g.*, A.3911; A.3889.)

C. THE DECISION BELOW IMPLICITLY CONFLICTS WITH THE DECISIONS OF FOUR STATE SUPREME COURTS AND ONE FEDERAL COURT OF APPEALS

Prior to the decision below, four state supreme courts and one federal court of appeals had rejected arguments that Boy Scouting is required under public accommodations laws to admit members or leaders in violation of the organization's standards for membership. *See Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998); *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998); *Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (1995); *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976).

Although none of these decisions explicitly reached the federal constitutional question, the opinions indicate that the courts were mindful of the rule of statutory construction that required them to interpret statutory law so as to avoid constitutional difficulties. *See, e.g., Welsh*, 993 F.2d at 1277 (declining to reach constitutional question but stating that court's discussion of Boy Scouting's "purpose and its right to determine whom to admit into membership impacts a constitutional right to Freedom of Association"); *id.* at 1283 (Cummings, J., dissenting) ("My inclination would have been to hold that the Scouts could exclude atheists under a line of free association decisions suggesting that individuals may form groups in the pursuit of political, social, economic, educational, religious and cultural ends."); *Curran*, 17 Cal. 4th at 699, 952 P.2d at 238 (unanimously holding California statute not applicable to Boy Scouts of America, "an expressive social organization," despite precedents applying statute to Boys Club and country club); *id.* at 722, 727, 952 P.2d at 253, 255-56 (Kennard, J., concurring) (noting the "rule of statutory construction" that an "ambiguous statutory term should be construed, if possible, to avoid constitutional difficulties" and citing the right of expressive association as protective of Boy Scouting's right "to exclude applicants with 'manifest views' at odds with those of the organization"); *Randall*, 17 Cal. 4th at 744, 952 P.2d at 266 (holding California statute not applicable to Boy Scouts of America, "a charitable organization with a predominantly expressive social purpose"). These decisions thus conflict in principle with the decision below. The same considerations that led these courts to reject the "public accommodation" argument also support our First Amendment defense.

It would be unfortunate for this Court to avoid decision in this case on account of a lack of explicit conflict on the constitutional question, because in all likelihood one will never arise. Any state supreme court that believes that requiring Boy Scouting to admit members who disagree with the organization's moral values would be unconstitutional would almost certainly interpret the public accommodations law in such a way as to avoid the constitutional question. Public accommodations laws are broadly and vaguely worded, and it requires considerable judicial ingenuity to apply them to Boy Scouting. Courts that think such a result would be unconstitutional would be unlikely to interpret state law to apply to Boy Scouting, and then hold the application to be unconstitutional. Thus, a clear conflict will probably never occur: those courts that agree with Boy Scouting's constitutional position will decide cases on statutory grounds, and only

those courts that disagree with Boy Scouting's constitutional position will reach the federal constitutional issue.

Yet for practical as well as doctrinal reasons, it is urgent that this Court intervene to provide guidance and coherence here. Various people with religious and moral views contradictory to those of Boy Scouting are seeking to use government power to obtain membership and leadership positions.[10] The ability to control the selection of Scoutmasters and Assistant Scoutmasters is a matter of intense concern to Boy Scouting's members, their families, and their sponsoring institutions. (A.4662; A.4685; A.4695-A.4696.) Other organizations are affected as well: the New Jersey court's interpretation of "public accommodation" is so sweeping, and its interpretation of First Amendment protections so stingy, that almost any organization could find itself a victim of a court's desire to foster social change by forcing private associations to conform to its idea of egalitarian values.

We recognize that the issue whether homosexual conduct is moral or immoral is controversial, and that many people of good will believe that Boy Scouting's position is misguided. That is not an issue in this case. Contro-

---

10 Pending challenges by those who seek to alter Boy Scouting's moral and religious views include *Richardson v. Chicago Area Council of Boy Scouts of America*, No. CCHR 92-E-80 (Chicago Comm'n on Human Relations 1996), *aff'd in rel. part*, No. 96 CH 3266 (Ill. Cir. Ct. Aug. 12, 1999), *appeal docketed*, No. 99-3018 (Ill. App. Ct. Aug. 23, 1999) (gay activist seeking to be uniformed professional adult leader); *Downey-Schottmiller v. Chester County Council of the Boy Scouts of America*, No. P-3986 (Pa. Human Relations Comm'n July 27, 1999), *appeal docketed*, No. 2291 CD 1999 (Pa. Commw. Ct. Aug. 27, 1999) (atheist activist seeking to be volunteer leader); *Pool v. Boy Scouts of America*, Nos. 93-030-PA, 93-031-PA (D.C. Dep't of Human Rights & Minority Bus. Dev.) (post-hearing briefing concluded May 18, 1998) (openly gay men seeking to be volunteer leaders), *sub judice*.

versial questions of personal morality, often involving religious conviction, are best tested and resolved within the private marketplace of ideas, and not made the subject of government compulsion. We can respect the plea of gay men and lesbians not to have traditional morality imposed upon them. By the same token, we ask that a contrary morality not be forced upon private associations like Boy Scouting, at the expense of First Amendment freedoms of speech and association.

CONCLUSION

The petition for a *writ of certiorari* should be granted.

Respectfully submitted,

MICHAEL W. MCCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

SANFORD D. BROWN
CERRATO, DAWES, COLLINS, SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75015

Attorneys for Petitioners